IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs September 25, 2001

STATE OF TENNESSEE v. TRACY TULLOCH[1]

Direct Appeal from the Circuit Court for Cocke County
No. 7450 O. Duane Slone, Judge

No. E2000-03046-CCA-R3-CD
November 30, 2001

The defendant entered a negotiated plea of guilty to attempted aggravated sexual battery for an agreed sentence of five years as a Range I standard offender, with the issue of alternative sentencing to be determined by the trial court. The trial court sentenced the defendant to five years incarceration. In this appeal, the defendant contends (1) the trial court erroneously sentenced the defendant without a sex offender evaluation required by Tenn. Code Ann. § 39-13-705; and (2) the trial court improperly applied sentencing enhancement factors and should have sentenced the defendant to alternative sentencing.[2] After a thorough review of the record, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

JOE G. RILEY, J., delivered the opinion of the court, in which JOSEPH M. TIPTON and ALAN E. GLENN, JJ., joined.

Ronald R. Reagan (at hearing) and Dennis C. Campbell (on appeal), Sevierville, Tennessee, for the appellant, Tracy Tulloch.

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[1] Defendant was indicted under the spelling "Tulloch," but other pleadings use the spelling "Tullock." Pursuant to our policy, we utilize the spelling in the indictment.

[2] The defendant does not challenge the length of his sentence, as it was an agreed five-year sentence. Instead, the defendant challenges the trial court's application of the sentencing enhancement factors in relation to their application to the denial of alternative sentencing. We address the defendant's issues I (whether the trial court erred in sentencing the defendant to the Tennessee Department of Correction and in failing to grant him an alternative sentence), III (whether the court erred by failing to place on the record sufficient findings of fact and reasons for enhancement as required by Tenn. Code Ann. §§ 40-35-209(c) and -210(f)), IV(whether the trial court erred in finding that the crime was committed to gratify the defendant's desire for pleasure or excitement), and V (whether the trial court erred in finding a prior history of criminal convictions as an enhancement factor) as a single issue.

Paul G. Summers, Attorney General and Reporter; Mark A. Fulks, Assistant Attorney General; Al C. Schmutzer, Jr., District Attorney General; and James B. Dunn, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The defendant entered a guilty plea to the offense of attempted aggravated sexual battery committed in October 1997 against his four-year-old stepdaughter. Although the plea agreement specified a sentence of five years, the manner of service of the sentence was to be determined by the trial court at a sentencing hearing.

TESTIMONY AT SENTENCING HEARING

Detective Maurice Shults of the Newport Police Department testified defendant was the four-year-old victim's stepfather. The victim informed Shults of the defendant's sexual activity with her after the victim and defendant watched an X-rated movie. Officers seized the victim's underwear; a lab test detected semen on them; and the DNA test excluded the natural father but not the defendant as a possible donor. The defendant first denied ever being alone with the victim but subsequently conceded he had been alone with the victim.

Officers seized an X-rated videotape entitled "Bang-a-Thon" at the residence. The victim's description of the tape she watched was similar to the tape seized.

The defendant did not testify at the sentencing hearing. In the pre-sentence report, he denied guilt of the offense. He contended he did not show the video to the child, but rather she independently watched part of it before he could stop her. He blamed the charge on the child's natural father's "twist[ing] and bend[ing] the truth" in order to "have me thrown in jail."

The pre-sentence report revealed that the thirty-one-year-old defendant had been adjudicated delinquent for the offense of aggravated sexual battery when the defendant was approximately fourteen years old.

I. SEX OFFENDER EVALUATION

Tenn. Code Ann. § 39-13-705 (Supp. 1998) provides:

> (a) . . . [E]ach sex offender who is to be considered for probation or any other alternative sentencing shall be required to submit to an evaluation for treatment, risk potential, procedures required for monitoring of behavior to protect victims and

> potential victims, and an identification under the procedures developed pursuant to § 39-13-704(d)(1).
>
> (b) Those offenders found guilty at trial or who pled guilty without an agreement as to length of sentence and/or probation and/or alternative sentencing that are to have a pre-sentence report prepared for submission to the court shall be required to submit to the evaluation referred to in subsection (a). Such evaluation shall be included as part of the pre-sentence report and shall be considered by the court in determining the sentencing issues herein stated. If the court grants probation or alternative sentencing, any plan of treatment recommended by such evaluation shall be a condition of the probation or alternative sentencing. Those offenders, that, as part of a negotiated settlement of their case, are to be placed on probation or alternative sentencing shall be required to submit to the evaluation referred to in subsection (a) as a condition of their probation or alternative sentencing and any plan of treatment recommended by such evaluation shall be a condition of probation or alternative sentencing.

Defendant correctly points out the evaluation is not a part of the record, and the trial court made no reference to it in sentencing the defendant. However, the pre-sentence report indicates the defendant was referred to an agency for evaluation and treatment well over a month prior to the sentencing hearing, and defendant informed the pre-sentence report officer that he had an appointment on August 1st, which was three weeks before the sentencing hearing.

No objection or reference to the evaluation was made by defendant at the hearing; thus, the issue is waived. Tenn. R. App. P. 36(a). Furthermore, it is appellant's responsibility to provide this court with all proper records, if indeed they do exist, with regard to an appellate issue. Tenn. R. App. P. 24(b); *see* State v. Taylor, 992 S.W.2d 941, 944 (Tenn. 1999). In addition, we subsequently conclude in this opinion that the trial court did not err in denying alternative sentencing. For these reasons, defendant is not entitled to relief on this issue.

II. DENIAL OF ALTERNATIVE SENTENCING

A. Standard of Review

This court's review of the sentence imposed by the trial court is *de novo* with a presumption of correctness. Tenn. Code Ann. § 40-35-401(d). This presumption is conditioned upon an affirmative showing in the record that the trial judge considered the sentencing principles and all relevant facts and circumstances. State v. Pettus, 986 S.W.2d 540, 543 (Tenn. 1999). If the trial court fails to comply with the statutory directives, there is no presumption of correctness and our review is *de novo*. State v. Poole, 945 S.W.2d 93, 96 (Tenn. 1997).

Under the Criminal Sentencing Reform Act of 1989, trial judges are encouraged to use alternatives to incarceration. An especially mitigated or standard offender convicted of a Class C, D or E felony is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary. Tenn. Code Ann. § 40-35-102(6).

In determining if incarceration is appropriate, a trial court may consider the need to protect society by restraining a defendant having a long history of criminal conduct, the need to avoid depreciating the seriousness of the offense, whether confinement is particularly appropriate to effectively deter others likely to commit similar offenses, and whether less restrictive measures have often or recently been unsuccessfully applied to the defendant. Tenn. Code Ann. § 40-35-103(1); *see also* State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

A court may also consider the mitigating and enhancing factors set forth in Tenn. Code Ann. §§ 40-35-113 and 114 as they are relevant to the § 40-35-103 considerations. Tenn. Code Ann. § 40-35-210(b)(5); State v. Boston, 938 S.W.2d 435, 438 (Tenn. Crim. App. 1996). Additionally, a court should consider the defendant's potential or lack of potential for rehabilitation when determining if an alternative sentence would be appropriate. Tenn. Code Ann. § 40-35-103(5); Boston, 938 S.W.2d at 438.

B. Analysis

Tenn. Code Ann. § 40-35-209(c) requires the trial court to make "specific findings of fact upon which application of the sentencing principles was based." Such findings shall be a part of the record. Tenn. Code Ann. § 40-35-210(f). The sole issue at the sentencing hearing was the manner of service of the agreed five-year sentence. The trial court specifically noted the presence of three enhancement factors and the absence of any mitigating factors. The trial court did not make any specific findings relating to alternative sentencing under the standards announced in Tenn. Code Ann. § 40-35-103(1). Thus, we review the denial of alternative sentencing *de novo* without any presumption of correctness.

The trial court applied sentencing enhancement factors (1) (previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range), (7) (the offense was committed to gratify the defendant's desire for pleasure or excitement), and (15) (abuse of a position of private trust). Tenn. Code Ann. § 40-35-114. The trial court placed great weight upon the last enhancement factor.

On appeal, the state concedes that the trial court's reliance upon factor (1) was misplaced. The juvenile adjudication of aggravated sexual battery does not qualify under factor (1); however, the defendant's juvenile adjudication renders enhancement factor (20) applicable (defendant was adjudicated to have committed a delinquent act as a juvenile that would constitute a felony if committed by an adult). State v. Adams, 45 S.W.3d 46, 58 (Tenn. Crim. App. 2000); Tenn. Code Ann. § 40-35-114(20). Accordingly, we apply enhancement factor (20). We do not give it great weight as the juvenile adjudication was approximately seventeen years ago.

The trial court erred in applying enhancement factor (7). Although this enhancement factor may at times be applied to the offense of rape, *see* State v. Arnett, 49 S.W.3d 250, 262 (Tenn. 2001), it may not be applied to attempted aggravated sexual battery because sexual gratification is an element of this offense. *See* State v. Walton, 958 S.W.2d 724, 730 n.6 (Tenn. 1997).

The trial court properly applied enhancement factor (15) as the defendant clearly abused a position of private trust. We agree with the trial court that this is entitled to great weight.

We further conclude that confinement is necessary in order to avoid depreciating the seriousness of the offense. Tenn. Code Ann. § 40-35-103(1)(B). The victim in this case was four years old, far below the age of thirteen which is the age limitation for attempted aggravated sexual battery. The facts are appalling.

Based upon our *de novo* review, we conclude the trial court did not err in denying alternative sentencing. The judgment of the trial court is affirmed.

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JOE G. RILEY, JUDGE